RECENT CASES.

CARRIERS—COMPETITION—INTERSTATE COMMERCE ACT—LONG AND SHORT HAUL CLAUSE—LOUISVILLE & NASHVILLE R. R. v. HENRY W BEHLUER, 20 Sup. Court (Oct. term) 209.—*Held*, that where carriers are subject to the Act to Regulate Commerce, that competition which is material can be taken into consideration for the purpose of determining the existence of a dissimilarity of circumstances and conditions within the meaning of P. 4 of the Act, although that competition does not originate at the initial point of traffic.

The Circuit Court of Appeals decided that according to the Long and Short Haul Clause in P. 4 (24 Stat. at L. 379), the plaintiff could not charge more for the shorter haul than for the longer, as the competition did not originate at the initial point of carriage This interpretation conformed with that of the I. S. C. C., but the latter has since altered their view to the one taken by the Supreme Court in *I. S. C. C.* v. *Alabama M. R. Co.*, 168 U. S. 144: that if the competition is material it does not matter whether it arises at the point of shipment or point of delivery. And it is not necessary that the competition should be of such a nature, that should one line not carry the goods between the two points, the other competing line would do so.

CARRIERS—DUTY TO RECEIVE—FREIGHT TO BE CARRIED OVER CONNECTING LINE—SEASONGOOD ET AL. v. TENNESSEE & O. TRANS. Co., 54 S. W. (Ky.) 193.—Defendants, who owned a boat which was accustomed to carry freight, refused to carry goods of plaintiff, because they were for a point beyond their route. *Held*, a carrier has no right to refuse to receive freight because it is destined to a point beyond its own line. A contract by one carrier with another that it will not receive goods destined to a point beyond its own line is illegal. Du Relle, J., dissents.

The correctness of this decision is open to doubt; the court cites no cases to uphold this doctrine, while in the case of *The Atchison, Topeka & Santa Fe R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667, it is laid down most emphatically that: "At common law a common carrier is not bound to take goods for a point beyond its own line." From this case it is evident that the Kentucky doctrine is opposed to that laid down by the U. S. Supreme Court.

CARRIERS—FREIGHT—DELIVERY—NOTICE TO CONSIGNEE—DIAMANT V. LONG ISLAND R. Co., 62 N. Y. Sup. 519.—Defendant agreed by bill of lading to transport merchandise and "tender it to the consignee." The bill also stated that "carriage should be complete and charges earned," when merchandise has been held a reasonable time without notice, subject to owner's order. The goods were held, but no notice was given to consignee. Consignor sued for value of goods. *Held*, that completion of the carriage did not dispense with defendent's express obligation to tender; though notice would have been sufficient to discharge him. Evidence of a custom dispensing with tender of delivery held inadmissible. MacLean, J., dissenting.

Carrier's liability as insurer when no notice is given is strictly held by the New Hampshire rule, which is followed by thirteen States, Canada and England. *Moses* v. *Boston, etc., R. R. Co.*, 32 N. H. 523; *Sherman* v. *Hudson R. R. R. Co.*, 64 N. Y. 254. The Massachusetts rule is that carrier's liability ceases on arrival and storage in a proper warehouse without notice, and carrier is then liable as warehouseman. Eleven States follow this rule. 5 A. & Enc. 277 (2d. ed.); *Norway Plains Co.* v. *Boston, etc., R. R. Co.*, 1 Gray (Mass.) 274; *Rothschild* v. *Michigan Central*, 69 Ill. 164.

CHARITIES—SOCIETIES FOR THE PREVENTION OF CRUELTY TO CHILDREN—PUBLIC CONTROL—PEOPLE EX REL. STATE BOARD OF CHARITIES v. NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 55 N. E. 1063 (N. Y.). —The New York Society for the Prevention of Cruelty to Children was incorporated for the enforcement of all lawful means necessary to that end. The State Board of Charities, created for the purpose of visiting and inspecting all charitable institutions within meaning of court, claimed the right to include the New York society within its jurisdiction. *Held*, that Society for Prevention of Cruelty to Children is organized for enforcement of criminal law, and does not come under jurisdiction of State Board of Charities. Martin, Haight, Vann, J. J., dissenting.

The practical value of this case lies in the distinction it makes between charitable institutions in their true legal meaning and institutions which, in a general sense, may be called charitable. An institution is not necessarily of a charitable nature because it has the capacity to take and administer gifts, nor can it be called charitable if incidentally it does something toward the alleviation of human misery and suffering. The term "Charitable Institution" can be legally applied only to those institutions, public or private, that give public pecuniary relief in that form commonly called "charity."

CONSTITUTIONAL LAW—DISCRIMINATION IN FAVOR OF RESIDENT CREDITORS —BLAKE ET AL. v. MCCLUNG ET AL., 20 Sup. Ct. Rep. 307.—A law giving priority to resident creditors of a corporation doing business in a State, *Held*, unconstitutional as depriving non-residents of the privileges and immunities of citizens of a particular State, and also as a denial of the equal protection of the law.

A mere compliance by the courts with the requirements of statutory enactments is not due process of law, but the statutes themselves must affect residents and non-residents alike. *R. R Co.* v. *Baty*, 6 Nebr. 37; *Taylor* v. *Porter*, 4 Hill (N. Y.) 140.

CONSTITUTIONAL LAW—STATE FISHERIES ACT—REGULATION OF COMMERCE—DUE PROCESS OF LAW—POLICE POWER—PEOPLE v. BUFFALO FISH CO., LTD., 62 N. Y., Sup. 543. *Held*, that Laws 1892, C. 488, § § 110, 112, making it a misdemeanor to catch, kill, or have in one's possession certain varieties of fish during certain periods of the year, and imposing a penalty for its violation, so far as they affect the possession and right of sale by a citizen of this State of fish imported by him from a foreign country, on which a customs duty has been paid, are in conflict with the power of Congress to regulate commerce, and to such extent are void; that these laws making it a misdemeanor to have in one's possession such varieties of fish during such periods, and imposing a penalty for the violating, so far as they affect the possession and sale of fish imported from without the State are unconstitutional, as depriving a person of his property without due process of law; that such act cannot be upheld as a lawful exercise of the police power of the State, on the ground of providing for the propagation and preservation of game fish in the waters of the State. Disapproving, *Phelps* v. *Racey*, 60 N. Y. 10.

The weight of authority seems to indicate that the States have the right to make and enforce such laws. *Magner* v. *People*, 97 Ill. 331; exparte Maier, 103 Cal. 476, 42 Am. St. Rep. 129. *State* v. *Saunders*, 19 Kan. 127, 27 Am. Rep. 98, and *Territory* v. *Evans*, 2 Idaho 634, agree with the above case. These State statutes are supported as being a valid exercise of the police power in *Roth* v. *State*, 51 Ohio St. 209, 46 Am. St. Rep. 566. The possession of game lawfully taken and killed is held no crime in *State* v. *Bucknam*, 88 Me. 385, 51 Am. St. Rep. 406, and *State* v. *Parker*, 89 Me. 81.

CONSTITUTIONAL LAW — INTERFERENCE WITH INTERSTATE COMMERCE BY QUARANTINE REGULATIONS—PARTIES—STATE OF LOUISIANA v. STATE OF TEXAS, 30 Sup. Ct., Rep. 251.—The State of Texas passed an act, under pretext of a quarantine regulation, excluding all goods from the State coming from New Orleans. In an action to test the validity of such act. *Held*, that the State of Louisiana could not maintain the suit, not being a proper party. See Comment.

CONSTRUCTIVE FRAUD—BURDEN OF PROOF—ROSEVEAR v. SULLIVAN ET AL., 62 N. Y. Supp. 447—Where an aged woman, mentally and physically weak, grants her property to one in possession of all his faculties, *held*, that the burden of proof that the transactions was fair is on the grantee, and if there be failure in this, constructive fraud will be presumed. *Green* v. *Roworth*, 113 N. Y. 462.

Woodward, J., dissented on the ground that sanity and ability to transact business are the ordinary conditions of grown men, and he who attacks the ability of a grantor to execute a deed, must prove the lack of ability by a preponderance of evidence. *Jones* v. *Jones*, 137 N. Y. 610. Where, as in this case, there is no fiduciary relation, influence must be proved by extrinsic evidence. *Fisher* v. *Bishop*, 108 N. Y. 25.

CONTRACTS REQUIRING CLAIM FOR DAMAGES TO BE PRESENTED WITHIN CERTAIN TIME—DAVIS v. WESTERN UNION TEL. CO., 54 S. W. 849 (Ky.).—In an action to recover damages for failure to deliver a telegram, *held*, that the stipulation in the contract for the transmission of the message requiring any claim for damages to be presented in writing within 60 days after the message is filed, is void as against public policy.

This decision is in accord with the rule laid down in *Enbank et al.* v. *Western Union Tel. Co.* 38. S. W. 1068 (Ky.); *Dryling* v. *The N. Y. and Wash. Print. Tel. Co.*, 35 Penn. St. 298. But the contrary view has been held in some states and in the Supreme Court of the United States on the ground that such stipulation is reasonable and obligatory. *Bearsley* v. *Western Union Tel. Co.*, 39 Fed. Rep. 181; *Dougherty* v. *Western Union Tel. Co.*, 54 Ark. 221; *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1.

CONTRACT—SUBROGATION—REFORMATION—ACCOUNT BOOKS—FALSIFICATION BY CASHIER—STATE BANK OF PIKE v. NAFUR ET AL., 61 N. Y. Sup. 779.—Plaintiff purchased assets of a firm and contracted to pay all of defendant's obligations, "as shown by the books of said firm." Five years later they discovered that cashier had falsified a particular book, on which they had based their previous calculation, and that they had paid out more than they supposed themselves liable to pay. *Held*, That where the defendants had made no fraudulent representations and there was no mistake by either party as to the terms of the contract, they could not recover the money in equity.

The plaintiff's contention for relief under the equitable doctrine of subrogation on the ground of mistake of fact, can not be allowed in the case at bar because the plaintiff "had the means of correct information within his power, but negligently omitted to avail himself of them." *24 Am. and Eng Ency. of Law* 284. The books were all in the hands of the plaintiff and an examination of them would have disclosed the error, as only one had been falsified. *Story on Equity* discusses this matter, § 105. That equity will not reform a contract for a mistake of law is well established, but it will grant a reformation if there is a *mutual* mistake of fact. However, in the case under consideration the mistake was unilateral, nor was this by reason of any fraudulent representations on the part of the defendant.

DANGEROUS MACHINERY—WARNING EMPLOYES—PRIOR ACCIDENTS—WYMAN v. ORR ET AL, 62 N. Y. Supp. 195.—Plaintiff, a boy of 15, was employed in a

paper mill to remove broken paper from sets of rollers. Electricity generated attracted the paper so strongly that it was drawn in between the rollers and his arms were crushed. In the trial plaintiff endeavored to introduce evidence of similar prior accidents in the same place, but it was excluded. As this was an appeal from judgment on direction of a verdict, the court considered the appellant entitled to most favorable inferences from evidence given and also from evidence erroneously excluded. *Held*, That it could not be said as matter of law that the accident was caused by an obvious danger, the risk of which the employe assumed. Kellogg, J., dissented.

To the general rule that a servant assumes the ordinary risks of his employment, and even the risks from unsafe machinery which are apparent and obvious, we find the exception that the master is liable if he exposes persons to perils which they, by reason of youth, do not comprehend. *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Union Pac. R. R. Co.* v. *Fort*, 17 Wall. 553, 14 *A. & E. Enc.* 892; *Illinois, etc., R. R. Co.* v. *Welch*, 52 Ill. 183; *Malone* v. *Hawley*, 46 Cal. 408.

DEEDS—MORTGAGES—WARRANTY—HOPPER V. SMYSER—SMYSER V. HOPPER, 45 Atlan. 206.—The habendum clause in a deed of conveyance declared the property subject to a mortgage, but in the warranty immediately following the mortgage was not expressly excepted. *Held*, that the failure to except in the warranty did not make the grantor liable for the mortgage, because the habendum clause limits the estate and interest which is described as conveyed, and the covenant of warranty could not enlarge an estate and interest thus limited.

The contrary view is held in some States, although an outstanding mortgage is not a breach of the covenant of warranty, yet the covenant is an undertaking that the covenantee shall at all times enjoy the land free from all such encumbrances existing at the time of the grant. 8 *A. & E. Encycl. of L.*, 2d ed. 97. *King* v. *Kilbride*, 58 Conn. 109, and cases cited.

DIVORCE—ADULTERY—CONDONATION—GEOGER V. GEOGER, 45 Atlan. 349 (N. J.).—In divorce proceedings against a woman for adultery, where she proved forgiveness by words on the part of her husband, and also his promise to receive her back into his home and convey property to her; this was held by the court to be an insufficient condonation of her offense by the husband.

This decision is contrary to the rule in *Shackelton* v. *Shackelton*, 48 N. J. Eq. 364, which held "that forgiveness may be expressed in words, and possibly by conduct without words, to show that the injured party meant to blot out the whole past."

The court based its decision upon *Teats* v. *Teats*, 1 S. W. and Tr. 334, which held that "words, however strong, can at the highest be regarded only as an imperfect forgiveness, and must remain incomplete, unless followed by a reconciliation."

Condonation requires reunion and reconciliation; a restoration of the offender to all the marital rights. 9 *A. and E. Ency. Law*, 222. The husband in this case showed only an inclination to condone the offense.

DIVORCE—ADULTERY—CUSTODY OF CHILDREN—OSTERHOUDT V. OSTERHOUDT, 62 N. Y., Sup. 529.—*Held*, that the court will not disturb a decree granting the custody of children to the wife from whom the plaintiff had obtained a divorce, on the ground that she had procured the divorce in a foreign jurisdiction and remarried, where no other misconduct is shown, and she has a comfortable home and the children are attached to her,

The New York court will not recognize the defendant's North Dakota divorce, and views her subsequent marriage as adultery. But it leaves her the custody of the chidren on the ground that her only misconduct depended on the legal question of the jurisdiction of the North Dakota courts in granting her a divorce, and that she was the better fitted for their custody. Barrett and

Van Brunt dissenting on the ground that this is a momentous departure from precedent to give custody of children to the guilty party; that her divorce being not only void from want of jurisdiction, but inherently fraudulent; and that her home is thus not a proper place for the children. The dissenting opinion agrees with *McGown* v. *McGown*, 19 N. Y. App. Div. 368, the facts of which are the same. Generally, a mother, guilty of adultery, is not a fit custodian for her children (see cases cited, *Am. Eng. Ency. of Law*, 2d ed., 9-689).

The custody of children is given to the mother who has been guilty of adultery in *Com.* v. *Addicks and wife*, 5 Binn (Pa.) 520, and *Haskell* v. *Haskell*, 152 Mass. 26.

ENTRAPMENT—PUBLIC POLICY—WALTON V. CITY OF CANON CITY, 59 Pac. Rep. 841 (Colo.).—*Held*, where a city marshal instigated a third party to procure the violation of a liquor law, public policy would not permit the collection of the penalty. The marshal's duty was to discover such violation.

But where a detective, without orders from the prosecuting attorney, procures a similar violation, it was held to be no defense. *People* v. *Curtis*, 54 N. W. Rep. 767 (Mich.).

ESTATES—DEVISE UPON CONDITION—VALIDITY—WRIGHT ET AL. V. MAYER, 62 N. Y. Sup. 610.—Plaintiff, while living separate from her husband, took land under a devise which provided that, if they should resume their marital relations, the estate so devised should cease and become vested in the testator's executors in trust to pay the income to the wife for life, and on her death to pay the principal to her children. *Held*, that the condition was valid.

This condition is considered valid by a divided court, on the authority of *Cooper* v. *Remsen*, 5 Johns Ch. 459. This seems to be correct, for while it is well settled that conditions annexed to a gift, the tendency of which is to induce husband and wife to separate or be divorced, are held void on the ground of public policy, even *Whiton* v. *Snyder*, 54 Hun. 552, which is here quoted against the validity of the condition, says "a provision for destitute wife might be humane" and valid.

HABEAS CORPUS—PRISONER HELD BY EXTRADITION WARRANT—FUGITIVE FROM JUSTICE—IN RE TOD, 81 N. W. 637 (S. D.).—Application for a writ of habeas corpus, the petitioner being held under an extradition warrant. On the hearing it was clearly shown, that the prisoner had come to South Dakota from Nebraska at the request of the party he had defrauded, that proceedings were instituted against him in Nebraska by the injured party, in pursuance of which the petitioner was held under an extradition warrant. *Held*, that the petitioner was not a fugitive from justice, and that he should be discharged from custody.

The motives that induce the withdrawal from the State are immaterial, where a person who has committed a crime departs without awaiting its results. (*In re White*, 55 Fed. Rep. 54; *State* v. *Richter*, 37 Minn. 436). But the mere fact that the accused left the State is not enough of itself to make him a fugitive from justice. All the circumstances in relation to the commission of the offense, the time and manner of leaving the State, should be inquired into. (*Amer. and Eng. Ency. of Law* (new ed.), Vol. 12, p. 602; Opinion of Governor Fairfield in case of *Certain Fugitives* (Me.), *Spear on Extradition* (3d ed.) 381; Opinion of Governor Collum in *Goffigan and Merrick's case*, *Spear on Extradition* (3d ed.) 385, 713.

HUSBAND AND WIFE—ACTION FOR ALIENATING HUSBAND'S AFFECTION—CROCKER V. CROCKER, 96 Fed. 702.—Action by a wife for the alienation of her husband's affection. No charge was made in the declaration of criminal conversation. *Held*, that a wife cannot, under the laws of Massachusetts, maintain an action against a third person for merely alienating the affection of her husband.

This decision seems to be based on the principle that the inferior has no right in the superior, and therefore the inferior can suffer no loss or injury. 3 *Bl. Comm.* 143. The common law gave to the wife no action for alienation of her husband's affection. *Duffies* v. *Duffies*, 76 Wis. 374; *Doe* v. *Roe*, 82 Me. 503. In some jurisdictions, however, the courts recognize that a wife has a right to her husband's society and affection, and, therefore, in a case like the present, a right of action. *Foot* v. *Card*, 58 Conn., 1. 18 *Atl.* 1027: *Warren* v. *Warren*, 89 Mich. 123; *Lynch* v. *Knight*, 9 H. of L. Cas. 589. Lord Campbell said that the wife might have action for the loss of the consortium of her husband. Statutes in this country have so modified the law that where a married woman may sue by herself for personal injuries, she can sue for loss of consortium of her husband. *Bennett* v. *Bennett*, 116 N. Y. 584; *Bassett* v. *Bassett*, 20 Ill. App. 543; *Clark* v. *Harlan*, 1 Cin. Rep. 418; *Leaver* v. *Adams*, 19 Atl. 776; *Westlake* v. *Westlake*, 34 Ohio St. 621; *Mehehoff* v. *Mehehoff*, 26 Fed. Rep. 13.

INSURANCE—CHANGE OF TITLE—NOTICE—WHITNEY v. AMERICAN INSURANCE CO. ET AL., 59 Pac. 897 (Col.).—Action brought by the mortgagee to recover the amount of an insurance policy. A mortgage clause in the policy provided "that the mortgagee or trustee shall notify this company of any change of ownership * * * which shall come to his knowledge." One B holding a general power of attorney for C, requested S, the owner of the insured property to make a deed of the property to C, which he did, and B had the deed recorded. Before C had accepted the conveyance, the building on the premises was destroyed by fire, whereupon he refused to accept. B immediately reconveyed the property to S. *Held*, that there was no change of ownership in the property which necessitated notice to the insurer.

The question in this case was whether the handing of the deed to B constituted a delivery. The test of delivery is: Did the grantor by his acts or words intend to divest himself of the title? If so, the deed is delivered. *Austin* v. *Tendall*, 2 M. S., Arthur, D. C. 362. Generally speaking the delivery of a deed to an agent appointed by the vendee therein to receive it is a delivery to such vendee. *Soward* v. *Moss*, 78 N. W. 373 (Neb.). In the case under review the court seems not to have regarded B as an agent of C, although he held a general power of attorney from him. Temple, J., dissenting.

INTERNATIONAL LAW—PRIZES—IN RE PUGNETTE HABANA, THE SOLA, 20 Sup. Ct. Rep. 290.—*Held*, vessels flying the enemy's flag engaged in coast fisheries, but carrying no arms, are not subject to capture. See Comment.

INTERSTATE COMMERCE—STATE LAWS AFFECTING—LICENSE TAX IMPOSED BY CITY.—PABST BREWING CO. v. CITY OF TERRE HAUTE ET AL., 98 Fed. Rep. 330.—The common council of Terre Haute, under authority of the Legislature, passed an ordinance imposing a license tax of $1,000 annually upon every person, corporation or firm maintaining a brewery, depot or agency within the limits of said city. The complainant maintained a depot in the city for storing its goods until they could be delivered, but had in the State of Indiana no brewery or place of manufacture for its goods. The complainant sought an injunction to restrain the enforcement of the ordinance chiefly on the ground that it is in conflict with the commerce clause of the Constitution. *Held*, that such a license tax is invalid, being a tax on interstate commerce, and not an exercise of the police powers of the state within the terms of the Wilson Act (26 Stat. C. 728).

The question is here considered as to the right of a state or city to tax the product of another state coming into it. The Supreme Court has decided that a state may impose a license fee upon intoxicating liquors, brought in from another state, when this license is for the purpose of regulating and controlling

the importation and sale, without violating the Constitution. *Hinson* v. *Lott*, 8 Wall U. S. 148; *License Cases*, 5 How U. S. 504. A license is for the purpose of control, supervision, or regulation of some act or thing, and not for revenue, for in such a case it is a tax. *Ash* v. *People*, 11 Mich. 347. *In re Wan Yin*, 22 Fed. Rep. 710. In the present case there was no evidence in the record that any provisions were made for the supervisiion, control, or regulation of such breweries, depots, or agencies. Therefore this assessment was a tax for revenue, outside the police powers of the state, and contrary to the interstate commerce clause of the constitution.

JUDGMENT AGAINST DECEDENT—IMPEACHMENT—ACTION BY HEIR—KAYES ET AL. V. VICKERY ET AL., 59 Pac. 628 (Kan.). *Held*, that at common law a judgment against a dead person is absolutely void and may be collaterally impeached by the heirs. Nor does it make any difference that service may have been obtained or the suit commenced before the death of the defendant.

There seems to be a wide diversity of opinion by the courts on this question. In the greater number of cases the rule appears to be that a judgment of the court rendered when one of the original parties was dead is voidable only, and can not be collaterally impeached, *Knott* v. *Taylor*, 99 N. Car. 511. In the case under discussion, the court confesses that its judgment was rendered "upon what appeared to be the reason and principle of the question and less upon the authority of the adjudged cases." There is, however, no lack of authority for this view, since in a number of states it has been held that a judgment against a decedent is absolutely void. *Life Association* v. *Fassett*, 120 Ill. 315.

LARCENY—GREEN GOODS—PEOPLE V. LIVINGSTONE, 62 N. Y. Supp. 9.—Prosecutor gave $500, with the expectation of receiving $3,000 counterfeit money. *Held*, if prosecutor parts with his property for an unlawful purpose, no prosecution for false pretenses can be sustained. *McCord* v. *People*, 46 N. Y. 470.

The court regrets that the defendant must be given a new trial and suggests that the Legislature alter the rule in *McCord v. People*, supra. There is a provision in the Penal Code for the punishment of "green goods" offenders, but prosecution under it is difficult owing to its technicalities.

LIFE INSURANCE—CONSTITUTIONAL LAW—VALIDITY OF STATUTE AFFECTING BUSINESS OF LIFE INSURANCE—MERCHANTS' LIFE ASS'N V. YOAKUM, 98 Fed. 251.—A statute in Texas allows a policy holder in a life insurance company to recover the amount of his policy and 12% interest theron, if the policy be not paid by the company within specified time after demand made. *Held*, this statute is valid and not in violation of the 14th Amendment.

The purpose of this statute is not to compel Life Insurance Companies to pay their debts, but to secure a proper degree of care on their part in writing policies. That the enactment of such a statute is but the valid exercise of the legislative power seems most reasonable. Foreign Insurance Companies, as between insurer and insured, are by far the stronger, and this statute is manifestly for the protection of the weaker. It is not an arbitrary classification, nor is it discriminative, but, in its application to all such companies, seeks only to subserve the public interests. *Railway Co.* v. *Matthews*, 165 U. S. 1; *Casualty Co.* v. *Allibone*, 90 Tex. 660, 40 S. W. 339, decide the validity of similar statutes and are in accord with the present decision.

MALICIOUS PROSECUTION—DAMAGES—PLEADING—EVIDENCE—EVINS V. METROPOLITAN ST. RY. CO., 62 N. Y. Sup. 495.—In an action for malicious prosecution and false imprisonment the complainant failed to allege any special damages to his business as a lawyer. *Held*, that it was error to admit evidence of the plaintiff's loss of business subsequent to the arrest. Goodrich, P. J., dissented.

Some courts hold that allegations of special damage must be made in the pleadings, especially where the earning power is extraordinary. *Baldwin* v.

Western R. Corp., 4 Gray (Mass.) 333; *Joslin* v. *Grand Rapids Ice Co.*, 50 Mich. 516. But it is also held that the loss of earnings and business engagements is the necessary result of personal injuries and need not be specially pleaded. *Luck* v. *Ripon*, 52 Wis. 200; *Ehrgott* v. *New York*, 96 N. Y. 264.

MARINE INSURANCE—INSURANCE ON PROFITS ON CARGO—TOTAL LOSS—ABANDONMENT—PORTION SAVED DELIVERED TO OWNERS AS PART PAYMENT—CANADA SUGAR REF. CO. v. INSURANCE CO. OF NORTH AMERICA, 20 Sup. Court Rep. 239.—Petitioners insured the profits on a cargo of sugar, against total loss only, in the Atlantic Mutual Insurance Co., and shortly afterwards took out another policy in the Insurance Co. of N. A., which is the respondent in this suit. The ship while on her voyage stranded and was abandoned to the Atlantic Co., which succeeded in saving about 300 tons of the sugar, which they sent to Montreal and turned over to the Sugar Company as part payment of their total loss policy. The other Company refused to pay, on the ground that there was not a total loss of goods. *Held*, a recovery of insurance on profits of a cargo under a policy insuring against total loss only, and valuing the profits at the sum insured, will not be prevented where the cargo was abandoned as a total loss, by the fact that other insurers of the cargo subsequently saved a portion of it, and then delivered it to the former owners in part payment, on a settlement of their liability for the total loss of the cargo.

There seems to be some doubt if the words "total loss only" will preclude the insured from recovering where there is simply a constructive total loss. Parsons considers it doubtful (*2 Parsons on Contracts 389*), *Thomson* v. *Royal Exchange Ass. Co.* 16 East 219, and contra, *Hubner* v. *Eagle Insurance Co.*, 10 Grey 131. This court, however, holds that there was a total loss as to the owners, since they had abandoned the cargo to one of the underwriters. No formal notice of abandonment was necessary, since, "Actual abandonment dispenses with formal notice."

MARRIED WOMEN'S ACT—COVERTURE—STATUTE OF LIMITATIONS—BLILER v. BOSWELL, 59 Pac. Rep. 798 (Wyo.).—*Held*, upon reason and authority a statute permitting a *feme covert* to sue and be sued alone, does not by implication do away with disability of coverture that excepts her from the statute of limitations.

The weight of authority inclines the other way. The English rule as to her separate estate, even before the Married Women's Property Act, was that the disability was removed; and undoubtedly thereafter. *In re Lady Hastings*, *35 Chan. Div. 94*; *Lowe* v. *Fox*, *15 Q. B. Div. 667*. Such is the New York rule. *Clark v. Gibbons*, *83 N. Y. 107*. Contra, Miss., Ohio, North Carolina, and Texas. The reason of the disability, it is conceived, ceases when the *feme covert* is allowed to act as a *feme sole*.

NEGLIGENCE—DEFECTIVE CONSTRUCTION—OWNER'S LIABILITY—BURKE v. IRELAND, 62 N. Y. Supp. 453.—Where the defendant hired an architect to draw plans for a building which were inherently defective, *held*, he cannot evade the liability for injury to a contractor's employe caused by its collapse, as the duty of securing a solid foundation for the building rested on the defendant, though the contractor was negligent in laying the foundation. *Vogel* v. *Mayor*, 92 N. Y. 10.

Goodrich, P. J., dissented on the ground that the failure of an architect to prepare sufficient plans cannot be imputed to his principal, unless the relation of master and servant or principal and agent exists. *Berg* v. *Parsons*, 156 N. Y. 109.

PATENTS—ANTICIPATION—PRIOR KNOWLEDGE AND USE.—WELSBACH LIGHT CO. v. AMERICAN INCANDESCENT LAMP CO. ET AL., 98 Fed. 613. *Held*, one applying for a patent in the U. S. for an invention previously made by him

and patented in a foreign country, may show actual date of his application in such country to prove the actual date of the invention, so as to avoid an alleged use in this country by an infringer before the date of the foreign patent.

This decision is in conformity with that of Judge Townsend in *Hanifen* v. *Price*, 96 Fed. 435, and that of Judge Dallas in *Hanifen* v. *Godshalk*, 78 Fed. 811. In *Hanifen* v. *Price*, this point was considered as new and the present case is the first affirmation we have seen of the principles in that case. See 9 YALE LAW JOURNAL 101.

SALES—CONTRACT—INSURANCE—OPTION TO RESELL—TITLE.—STOWELL ET AL. v. CLARK ET AL., 62 N. Y. Sup. 155.—Action on a policy of insurance, conditioned to be void if the interest of the insured in the property was other than sole and unconditional. Plaintiffs had purchased the machinery covered by such policy, with an option after a certain time to return it, and receive back the money paid or to pay the balance and keep it. *Held*, that plaintiffs were entitled to collect the insurance on the property destroyed, as under the contract they took an absolute title.

A purchase with right of return passes title and risk immediately to the vendee, and leaves the vendor obliged to rebuy at the vendee's option; this is the prevailing American rule. *Martin* v. *Adams*, 104 Mass. 262; *McKinney* v. *Bradlee*, 117 Mass. 321. But some cases hold that such a conditional sale is only a bailment till the time limit has expired. This is the English rule and conflicts with American rule generally. *Elphick* v. *Barnes*, 5 C. P. D. 321; *Carter* v. *Wallace*, 35 Hunn (N. Y.) 189.

SALE OF HORSE—WARRANTY—BREACH—DAMAGES—BRUCE v. FISS, DOERR & CARROLL HORSE CO., 62 N. Y. Supp. 96.—A horse was bought under a false warranty that he was a good carriage horse. *Held*, that the purchaser can recover damages for an injury caused by an attempt to use it for that particular purpose. *Randall* v. *Newson*, 2 Q. B. Div. 102; *Jones* v. *George*, 61 Tex. 345.

Contrary to this well established rule, *Schurmeier* v. *English*, 46 Minn. 306, held that the purchaser of a warranted wagon could not recover for damages done to a horse drawing it.

SET-OFF—CLAIMS PURCHASED BY DEFENDANT AFTER SUIT BROUGHT—WELLS v. OVERBY, 54 S. W. 955 (Ky.).—*Held*, that claims against plaintiff purchased after suit brought are a proper subject of set-off.

This decision is contrary to the great weight of authority, the general rule being that a claim is not a proper subject of set-off unless it existed in favor of the defendant at the time action is brought. 22 *Am. Eng. Enc. of Law* 274.

SHIPPING—DAMAGES TO CARGO—SEAWORTHINESS—FARR & BAILEY MFG. CO. v. INTERNATIONAL NAV. CO., 98 Fed. 636.—A ship started on a voyage with one porthole insecurely fastened, which became open so that water entered and damaged cargo. *Held*, she was unseaworthy, because not in a fit condition. Gray, J., dissents.

This case was distinguished from *The Silvia*, 171 U. S. 462, where the iron ports being left open purposely to admit light, the glass ports were broken and damage done by water entering. Damage was here held to be due to fault in management, from which the owners of a ship are exempt, by the Harter Act, exempting the owners from any damage resulting from any fault or error in the navigation or in the management of the vessel.

This seems a very close distinction and one not entirely warranted by the authorities. We are inclined to follow the view of Judge Gray, who, in his dissenting opinion, cites the case of *Hedley* v. *Steamship Co.* 1894, *App. Cases*

222, and upholds the case of The Silvia. It would certainly seem to be stretching the meaning of unseaworthiness to say that a vessel is unseaworthy because of a porthole insecurely fastened.

STREET RAILWAY—CONTRIBUTORY NEGLIGENCE—APPORTIONMENT OF FAULT—ANDERSON v. METROPOLITAN CO., 61 N. Y., Sup. 899.—Plaintiff, while ridlng on a wagon that was approaching at right angles a street railway, saw a car approaching about thirty feet distant. The driver did not stop or alter his course and the wagon was struck by the car. *Held*, plaintiff could not recover damages, as he was not free from fault.

The present case is distinguishable from the rule laid down in *Gilbert* v. *Erie R. Co.*, 97 Fed. 747, 9 YALE LAW JOURNAL 234, that where plaintiff and defendant are concurrently negligent the defendant is liable if the exercise of reasonable care on his part would have avoided plaintiff's injury. To have this rule, which seems to be well established in the United States courts, apply, gross negligence on the part of defendant is contemplated and only slight negligence on the part of the plaintiff, a state of facts which does not exist in the present case. Here the negligence seems to be not only concurrent, but of equal degree.

STREET RAILWAYS—PECULIAR OPERATION—NEGLIGENCE PER SE—CITIZENS' ST. RY. CO. v. HOFFBAUER, 56 A. E. 54 (Ind.).—Defendant operated an open electric car, entered from one side by a foot-board running the length of the car. The car at a certain point was run on the left instead of on the right hand double track, with the foot-board but a few inches from the trolley poles. At dusk a passenger, ignorant of the peculiar manner of operation, was injured by stepping on the foot-board and being hit by a trolley pole. *Held*, the facts are sufficient to justify a finding of negligence, but not to constitute a case of negligence per se.

The general tendency of modern decisions is to limit the province of the jury by the extension of the per se doctrine in cases where negligence is clear. *Beach Contri Neg.* 3rd Ed., § 453. The ruling in the present case is contrary to this tendency, as many much more doubtful cases have been held within the per se rule. *French* v. *R. R. Co.*, 116 Mass. 537; *Daniels* v. *Liebig Co.*, 42 Atl. 447. Riding on a foot-board is held not negligence on part of plaintiff in *Brainard* v. *R. R. Co.*, 61 N. Y. Sup. 74, 9 YALE LAW JOURNAL 182.

SURVIVAL ACTS—INSTANTANEOUS DEATH—AMOUNT OF DAMAGES—BROUGHEL v. SOUTHERN NEW ENGLAND TELEPHONE COMPANY, 45 Atl. Rep. 435 (Conn.).—Under a statute providing that a decedent's cause of action, even in case of instantaneous death, shall survive to his administrator; the damages to be awarded are not confined to nominal damages, even though as a matter of fact, "death was instantaneous and the decedent suffered no pain or sensation, and never regained consciousness. See Comment.

TREATIES—ENABLING STATUTES—RIGHTS OF ALIENS—BLYTHE v. HINCKLEY, 59 Pac. Rep. 787 (Cal.).—This presented the novel question, whether a statute giving non-resident aliens the right to hold land was unconstitutional as a usurpation of the treaty-making power, when the treaty was silent upon this point. *Held*, in absence of a contrary treaty stipulation, statute was valid, *Hanreck* v. *Patrick*, 119 U. S. 156; and in case of conflict was not void, but merely suspended during the operation of the treaty. *Geofry* v. *Riggs*, 133 U. S. 258.

VERDICT—NEW TRIAL—MALPRACTICE—EVIDENCE—PHOTOGRAPHS—EXCEPTIONS—JAMESON v. WELD, 45 Atlan. 299 (Me.).—Action on the case against the defendant, a physician and surgeon, for malpractice in treating the plaintiff

for an injury to the elbow of the right arm. An X-ray photograph was admitted in evidence, and exception taken by counsel for defendant on the ground that it was an exaggeration and a distortion. *Held*, that it was a discretion of the presiding justice to admit an X-ray photograph, and his determination thereon is not open to exceptions.

This seems to be the rule in Mass. *Blair* v. *Pelham*, 118 Mass. 420; *Van Houten* v. *Morse*, 162 Mass. 414. In *Udderzook* v. *Com.*, 76 Pa. St. 340, it was held that the court may take judicial cognizance of a photograph as of other matters of science. Some authorities are more reserved. In *Cunningham, Admx.*, v. *Fair Haven & Westville R. R. Co.*, 72 Conn. 244, the court said, "We do not see how this preliminary question differs from any other, where questions of fact and law may be intermingled—the conclusions of the trial judge may be so clearly against law that we can to a certain extent review them." *Geer* v. *Missouri L. & M. Co.*, 134 Mo. 85; *McLean* v. *Scribbs*, 52 Mich. 219.

WILLS—EVIDENCE OF EXISTENCE—IN RE CAMERON'S ESTATE, 62 N. Y. Sup. 187.—*Held*, that photographs of a lost will and codicil are admissible in evidence to prove its existence and defeat proceedings to obtain letters of administration.

Photographs of places are frequently given to juries, where the jury cannot view the places. But such photographs are subject to attack as being inaccurate. *Dyson* v. *N. Y. and New England R. R.*, 57 Conn. 7; *Cunningham* v. *Fair Haven and Westville*, 72 Conn., 244. Photographs of documents, if properly authenticated, are sometimes admitted where better evidence cannot be obtained. *In re Stephens*, L. R. 9 C. P. 187.